IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALLAN D. WINDT and ALLAN D. WINDT, P.C.	:	CIVIL ACTION
v.	:	
SHEPARD'S/McGRAW-HILL, INC.	:	NO. 96-1527

MEMORANDUM AND ORDER

HUTTON, J. November 4, 1997

Presently before this Court is the Defendant's Motion in Limine, Excluding All Testimony By Plaintiff Regarding Alleged "Lost Sales." For the reasons stated below, the motion is granted.

I. BACKGROUND

In this action, the plaintiff alleges that the defendant, Shepard's/McGraw Hill, Inc., published the third edition of the plaintiff's book in September of 1995. According to the plaintiff, the defendant broke its promise to proofread the book before publishing it, resulting in numerous typographical and substantive errors. One such mistake alleged is that over two-hundred footnotes failed to match up with the corresponding text.

The plaintiff alleged the following causes of action in his second amended complaint: (1) intentional or reckless misrepresentation (Count I); (2) negligent misrepresentation (Count II); (3) breach of contract (Count III); (4) defamation (Count IV); (5) breach of fiduciary duty (Count V); (6) intentional infliction

of emotional distress (Count VI); and (7) damages associated with additional hours spent by plaintiff in proofreading the manuscript (Count VII). After summary judgment was partially granted, only plaintiff's claims for intentional or reckless misrepresentation (Count I) and breach of contract (Count III) remained. Further, this Court allowed plaintiff's allegations of damages associated with additional hours spent by the plaintiff in proofreading the manuscript (Count VII) to survive, finding these damages relevant to the fraud and breach of contract counts. Currently before the Court is the defendant's motion in limine regarding the plaintiff's offer of proof on damages.

II. DISCUSSION

A. Breach of Contract Claim

At the summary judgment stage, this Court found that New York law governed the breach of contract claim. Windt v. Shepard's/McGraw-Hill, Inc., No. 96 Civ. 1527, slip op. at 8 (March 25, 1997). Under New York law, the essential elements for breach of contract are as follows: (1) making of an agreement; (2) due performance by the plaintiff; (3) breach by the defendant; and (4) damage suffered by the plaintiff. Van Brundt v. Rauschenberg, 799 F. Supp. 1467, 1470 (S.D.N.Y. 1992). "Although a party is not to be denied damages when they are necessarily uncertain," "New York law does not countenance damage awards based on '[s]peculation or conjecture.'" Wolff & Munier, Inc. v. Whiting-Turner Contracting

Co., 946 F.2d 1003, 1010 (2d Cir. 1991) (citing Berley Indus., Inc. v. City of New York, 45 N.Y.2d 683, 687 (1978)). Further, New York contract law requires a plaintiff to show that "it is certain that damages have been caused by a breach of [the] contract." Indu Craft, Inc. v. Bank of Baroda, 47 F.3d 490, 496 (2d Cir. 1995) (quoting Wakeman v. Wheeler & Wilson Mfg. Co., 101 N.Y. 205, 209 (1886) (emphasis added).

B. Plaintiff's Testimony on Damages

In the instant matter, the plaintiff offers only his own testimony to establish the damages associated with his breach of contract claim.[1] The defendant, however, seeks to preclude the plaintiff from testifying that the sales of the book would have been greater absent the typographical errors. The defendant argues that the plaintiff is not an expert in this field, and has no personal knowledge that these errors had a negative impact on

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1 At the summary judgment stage, the plaintiff offered the expert opinion of Michael B. Solomon, Certified Public Accountant, to establish the damages associated with the breach of contract allegations. Mr. Solomon stated that his estimate of damages was calculated by comparing the second edition sales results to what should have been the third edition results. This Court found that this method of calculating damages was acceptable because it presented a reasonable quantity of information from which a jury could fairly estimate the damages. Windt, No. 96 Civ. 1527, slip op. at 5. On November 3, 1997, however, the plaintiff informed this Court of his decision not to call Mr. Solomon as a witness.

Apparently, the plaintiff recognized the limited relevance Mr. Solomon's testimony would have to this case. Mr. Solomon admitted that when he compared the sales between the different editions, he failed to consider: 1) the impact of differences in marketing techniques between the editions, Solomon Dep. at 17-21; 2) whether the plaintiff's prior books may have saturated the market and decreased sales for his latest book, id. at 14, 25, 31; and 3) whether the sales decrease was caused by the increase in the price of the last book, id. at 45. Thus, while Mr. Solomon could calculate the difference in sales between the editions, he could not state that the third edition's sales were lower due to the defendant's alleged breach.

sales. Thus, the defendant contends that the plaintiff cannot give his opinion estimating his own damages.

A witness may offer opinion evidence under Rule 701 or Rule 702 of the Federal Rules of Evidence. Under Rule 702, a qualified expert may testify in the form of an opinion in certain instances. See Indian Coffee Corp. v. Procter & Gamble Co., 752 F.2d 891, 899 (3d Cir.), cert. denied, Folger Coffee Co. v. Procter & Gamble Co., 474 U.S. 863 (1985) (discussing the qualifications necessary for an expert and lay opinion). The plaintiff does not purport to be an expert in the field of accounting, the sale of legal publications, or any other domain that would allow him to testify as an expert on damages in this case.

Instead, the plaintiff offers his testimony concerning damages under the confines of Rule 701 of the Federal Rules of Evidence. Rule 701 states as follows:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Fed. R. Evid. 701. Thus, a lay witness may only testify in the form of an opinion where the testimony is "based upon personal knowledge or observation, in accordance with Rule 602, and [it would] be helpful to understanding the witness's testimony or determining a fact in issue." Charles E. Wagner, Federal Rules of

Evidence Case Law Commentary 502 (1996-97) (footnotes omitted). Moreover, "[w]hile lay witnesses are not allowed to speculate, they may offer testimony regarding terms or matters which are prominent enough in the layman's environment that a familiarity with respect to the subject area would exist." Id. at 503 (footnotes omitted); see Eckert v. Aliquippa & S. R.R., 828 F.2d 183, 185 n. 5 (3d Cir. 1987) (noting plaintiff's ability to testify as to causation of accident by virtue of his thirty years experience and full familiarity with railroad procedures).

Several courts have allowed a lay witness to testify to damages arising from a breach of contract, even where the damages computation took extraordinary skill and expertise. For example, in Teen-Ed, Inc. v. Kimball Int'l, Inc., 620 F.2d 399 (3d Cir. 1980), the United States Court of Appeals stated:

> Both the parties and the trial court failed to distinguish between opinion evidence which may be introduced by lay witnesses and that which requires experts. The modern trend favors the admission of opinion testimony, provided that it is well founded on personal knowledge and susceptible to specific cross-examination. A lay witness in a federal court proceeding is permitted under Fed. R. Evid. 701 to offer an opinion on the basis of relevant historical or narrative facts that the witness has perceived. . . .
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> . . . . The expression of opinions or inferences by a lay witness is permitted because of the qualification in Rule 701(a) that the factual predicate of the testimony be within the witness's perception. This qualification simply reflects a recognition of the limitation embodied in Fed.R.Evid. 602,

> that a witness must have "personal knowledge of the matter" in order to testify to it.

Id. at 403 (footnotes and citations omitted) (emphasis added).

In Teen-Ed, Inc., the plaintiff/appellant "had sought to prove damages by showing a loss of profits. [It proposed] offering the testimony of one Samuel Zeitz, a licensed public accountant who had served as appellant's accountant." Id. at 402. The United States Court of Appeals held that "the personal knowledge of appellant's balance sheets acquired by Zeitz as Teen-Ed's accountant was clearly sufficient under Rule 602 to qualify him as a witness eligible under Rule 701 to testify to his opinion of how lost profits could be calculated and to inferences he could draw from his perception of Teen-Ed's books." Id. (emphasis added). Thus, Zeitz's personal knowledge stemming from his educational background and experience with the plaintiff's accounting records led the court to its conclusion.

Moreover, in Joy Mfg. Co. v. Sola Basic Indus., Inc., 697 F.2d 104 (3d Cir. 1982), the Third Circuit again held that a lay witness could testify to lost profits arising from a breach of contract. In Joy Mfg. Co., Steven Baldwin, a plaintiff's witness, testified as to his familiarity with the plaintiff's business and the plaintiff's use of the defendant's products. Id. at 107-08. Further, he offered his estimation of expenses related to downtime attributable to the defendant's breach. Id. However, when Baldwin was unable to "state precisely why a furnace was inoperable at a

particular time," the trial court chose to strike much of his testimony. Id. at 108, 112.

The Third Circuit reversed, stating that:

> the trial court clearly abused its discretion in striking Baldwin's testimony insofar as he, based on his personal knowledge, testified to the percentage of downtime due to hearth problems. The record reveals that Baldwin, in his position as Supervisor of Production Control, had extensive personal knowledge of Joy's plants, its on-going heat treating processes, and the two furnaces in question.

Id. at 111. Thus, the Court found that Baldwin's opinion estimating downtime was rationally related to his personal knowledge of Joy's furnace operation. Id. at 112.

Accordingly, in In re Merritt Logan, Inc., 901 F.2d 349 (3d Cir. 1990), the Third Circuit allowed the plaintiff's principal shareholder, Mr. Logan, to state his opinion as to the company's lost profits. Id. at 360. Further, Joseph Gilchrist, a plaintiff's witness who had surveyed a proposed site and had made an estimate of likely sales that could be achieved at that site, was allowed to present his survey. Id. The court held that Mr. Logan's personal knowledge regarding the business he owned for many years and Mr. Gilchrist's personal knowledge of how he conducted his survey allowed this result. Id.

Finally, in Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190 (3d Cir. 1995), the Third Circuit discussed the Rule 701

requirements. In interpreting Rule 701 and this Circuit's case law, the Court stated:

> Rule 701's requirement that the opinion be "rationally based on the perception of the witness" demands more than that the witness hav[ing] perceived something firsthand; rather, it requires that the witness's perception provide a truly rational basis for his or her opinion. Similarly, the second requirement - that the opinion be "helpful to a clearer understanding of the witness's testimony or the determination of a fact in issue" - demands more than that the opinion have a bearing on the issues in the case; in order to be "helpful," an opinion must be reasonably reliable. In other words, Rule 701 requires that a lay opinion witness have a reasonable basis grounded either in experience or specialized knowledge for arriving at the opinion that he or she expresses. See [United States v.]Paiva, [892 F.2d 148, 155-57 (1st Cir. 1989).

Id. at 1201. Thus, when a court is deciding whether to allow a lay witness to give an opinion, it must conduct a sufficient screening process:

> In determining whether a lay witness has sufficient special knowledge or experience to ensure that the lay opinion is rationally derived from the witness's observations and helpful to the jury, the trial court should focus on the substance of the witness's background and its germaneness to the issue at hand. Though particular educational training is of course not necessary, the court should require the proponent of the testimony to show some connection between the special knowledge or experience of the witness, however acquired, and the witness's opinion regarding the disputed factual issues in the case.

Id. at 1202 (finding Teen-Ed, Inc., Joy Mfg. Co., and In re Merritt Logan, Inc. met this standard).

In the instant case, the Court must conduct a "judicial Rule 701 screening" to determine whether the plaintiff meets these requirements. Id. On November 3, 1997, this Court held a hearing regarding the plaintiff's ability to testify as a 701 witness. The plaintiff stated his desire to give his opinion that, based on accounting records prepared by Mr. Solomon, he suffered lost profits caused by the defendant's breach. However, the plaintiff failed to explain why or whether his basis for that opinion was different then when he gave his September 17, 1996, deposition.

At his deposition, the plaintiff was asked about his knowledge regarding any lost profits he may have suffered as a result of the defendant's alleged breach:

> Question: Is it your contention in this case that there was a greater percentage of returns on the third edition attributable to the errors in the book?
>
> Answer: Well, there's two parts to my answer. Number one - and this is a matter of common sense - one would expect to lose sales from the combination of a book that had so many inaccuracies and typographical errors and, number two - what was part of that also - that, when one has to wait four or five months for volume one, and one, basically, has volume two, half of it, tables or indexes, almost half - I have to look and see.
>
> You would lose some sales by virtue of the fact that you are not - you are not shipping.

So, number one, based on common sense, one would expect some loss of sales. I guess there are three parts to my answer.

Number two, I can't tell you how many books I would have sold, had it not been for the errors and the delay in sending people volume one.

But, number three, I would hope than an expert would be able to do an arithmetical analysis to show that a certain percentage of sales necessarily or logically or more reasonably, more likely than not would have been lost by virtue of the problems that the book had.

Question: Let me break this down. You don't have the expertise in order to proffer that opinion; is that correct?

Answer: I can proffer the opinion that, as a matter of common sense, when one publishes a book that's this defective, it would have adverse repercussions.

Number two, I can't sit here and tell you that I somehow can read a crystal ball and know that I would have sold 500 more books had it not been for the problems. And so I can't sit here and quantify how many more books I would have sold had it not been for the problems.

I would expect or hope - I mean, I haven't been through this in detail, and it's up to my lawyer to look for around an expert witness. I would expect or better hope that an expert witness can do an arithmetical analysis to show that, at least, a certain percentage of sales were lost.

Question: What I'm trying to get at is this. I am trying to get at not what you hope an expert witness will do, but your factual knowledge, your personal knowledge.

* * *

Answer: Number one, that, logically, I am familiar with the fact that for many months people couldn't get the book. And, according to Tom Krebs, [the defendant] had about 170 calls complaining about the fact that they couldn't get volume one. And it's obvious to me, using no expertise as - some kind of book publisher I'm not, but just as an author or common sense tells you that [I am] going to lose some sales.

Number two, I can't sit here and quantify how many sales were lost by virtue of the problems.

* * *

But - but if any quantity, if any indication is going to be done, I would expect it wouldn't be done by me at trial.

Question: Let me ask you this question. Identify for me every person that you know canceled a subscription to your book because of the errors.

Answer: I wouldn't know anybody who would call the author and say to cancel because of errors. No one has ever talked to me, who buys the book, about the errors, and I wouldn't talk to them either, of course.

Question: Let me just clarify that. No one who has purchased your book has ever spoken to you about the errors in the book?

Answer: Of course not. No purchaser has ever called me, the author, to complain about errors in the book or typographical errors or proofreading errors.

* * *

> Question: No one has - no person expressed to you any negative attitudes or feelings about your book as a consequence [of] the errors that you noted.
>
> Answer: Of course not.

Pl.'s Dep. at 35-39 (emphasis added).

In fact, when asked at his deposition, the plaintiff could not identify one person who had returned his book because of the errors. Id. at 44. Thus, the plaintiff could not estimate any amount of lost sales, except to the extent that his "common sense" told him that some people must have chosen not to buy the book because of the errors. However, the plaintiff's "common sense" analysis was clearly based on his unfounded theories:

> Question: But you don't have any factual knowledge of [lost sales]; that's speculation on your behalf, correct?
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> Answer: Well, we all - anyone would agree - just using common sense, everyone knows there has been some lost book sales. Quantifying it is another thing. The only way I can envision, as I sit here today, quantifying it through an arithmetical analysis, which I have suggested to you before.
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> * * *
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> Question: But what I would like to know is whether you have any person who has told you that or any document that says that books were returned as a result of the -
>
> Answer: And the answer is, of course, no, I don't.

Pl.'s Dep. at 44-45. Finally, the plaintiff stated that he knew of no subscriber that told him that the errors influenced his decision to purchase or not to purchase the book. Id. at 100.

Applying the Asplundh Mfg. Div. standard in the instant case, this Court finds that the plaintiff fails both of the Rule 701 requirements. First, the plaintiff's perception does not provide a truly rational basis for his opinion. The plaintiff admitted numerous times during his deposition that he did not rely on any basis for his opinion, other than "common sense." Pl.'s Dep. at 35-39. In fact, the plaintiff's assumptions underlying his "common sense" analysis are unfounded. While the plaintiff concludes that "common sense tells you that [I am] going to lose some sales," Pl.'s Dep. at 38, he failed to research his presumptions. Thus, the plaintiff lacks firsthand knowledge of any subscriber that canceled its subscription or returned the book due to the errors, of any complaints about the errors by subscribers, or whether the errors caused any lost sales. Pl.'s Dep. at 37-39, 44-45, 99-100.

Second, the plaintiff's opinion is not reasonably reliable; he does not have a "reasonable basis grounded either in experience or specialized knowledge for arriving at the opinion that he [wishes to] express[]." Asplundh Mfg. Div., 57 F.3d at 1201. Unlike the 701 witnesses in Teen-Ed, Inc., Joy Mfg. Co., and In re Merritt Logan, Inc. the plaintiff lacks the experience in the

relevant industry, or as an accountant or a financial analyst, to determine that his book should have made more money. Moreover, unlike Mr. Gilchrist's testimony in In re Merritt Logan, Inc., the plaintiff lacks the personal knowledge to testify to a computation of his lost profits.

Instead, the plaintiff, relying on Mr. Solomon's accounting records derived from his previous editions, wishes to testify that the third edition of his book made less money then it should have. However, the plaintiff has not shown how, by comparing the records, he might have the ability to reach this conclusion. Further, even if the book made less money then he believes it should have, the plaintiff has a complete lack of knowledge regarding whether any breach by the defendant caused the damages he is prepared to testify to.

Finally, when he made his "common sense" assumptions,[2] the plaintiff never considered other relevant factors that may have influenced the sale of this edition, such as: 1) the impact of differences in marketing techniques between the editions; 2) whether the plaintiff's prior books may have saturated the market and decreased sales for his latest book; or 3) whether the sales decrease was caused by the increase in the price of the last book.

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2. See Asplundh Mfg. Div., 57 F.3d at 1203-05 (stating that "metal failure and the proper design of hydraulic cylinders" was outside the scope of the realm of "common knowledge" or "common sense). This Court finds that lost profit calculations based on typographical errors is similarly outside the scope of "common sense" computation.

Thus, the plaintiff's opinion as to his "lost sales" caused by the defendant's breach is unfounded.

Therefore, the plaintiff cannot pass the judicial Rule 701 screening that this Court must apply. His complete lack of knowledge regarding any lost sales clearly distinguishes his ability to give an opinion from those 701 witnesses discussed in the cases above. Instead of helping the jury, such speculative testimony could only confuse the jury. Therefore, the defendant's motion is granted, and the plaintiff is precluding from testifying regarding his alleged lost sales.

An appropriate Order follows.

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O R D E R

AND NOW, this 4th day of November, 1997, upon consideration of Defendant’s Motion in Limine, Excluding All Testimony by Plaintiff Regarding Alleged “Lost Sales,” IT IS HEREBY ORDERED that the Defendant's Motion is **GRANTED**.

BY THE COURT:

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HERBERT J. HUTTON, J.